



Feedback on the Disability Inclusion (Restrictive Practices-NDIS) Amendment Bill 2020

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Department of Human Services Disability Access and Inclusion**RE: NDIS Restrictive Practices****PO BOX 292****ADELAIDE SA 5000****email: DHSSADisabilityReformIGR@sa.gov.au**18th January 2021

I am writing to provide some feedback to the Disability Inclusion (Restrictive Practices – NDIS) Amendment Bill 2020. I understand that this Bill is likely to be a first in a series of legislation that will cover other institutions. Therefore it is essential that this Bill strikes the right balance between the use of restrictive practices and a person's fundamental rights, especially in relation to children and young people.

It is also understood that South Australia – unlike other states – is essentially a common law jurisdiction and common law does not authorise the use of restrictive practices. There are some areas that are legally authorised to use restrictive practices through the *Mental Health Act 2009*, *Youth Justice Administration Act 2016* and *Correctional Services Act 1982*. This means that currently there are institutions in South Australia unlawfully using restrictive practices that may be liable to criminal, tortious or civil actions.

In everything I do I am guided by the UN Convention on the Rights of the Child (UNCRC). In fact the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (OAB Act) states that all state authorities must seek to “protect, respect and seek to give effect to the rights set out from time in the” UNCRC.ⁱ Further, one of my functions under the OAB Act is “to assist in ensuring that the State, as part of the Commonwealth, satisfies its international obligations in respect of children and young people,”ⁱⁱ promoting and securing the full range of children's rights and placing children at the centre of policy development, design and delivery, reviewing systems and services through a child's rights lens.

The Declaration on the Rights of the Child was the first international instrument recognising that “the child, by reason of his physical and mental immaturity, needs special safeguards and care.”ⁱⁱⁱ The UNCRC is built on this Declaration stating that “children are not just objects who belong to their parents and for whom decisions are made” rather they are individuals, or “adults in training”. They are human beings and individuals and until 18 it should be a “special, protected time, in which children must be allowed to grow, learn, play develop and flourish in dignity”^{iv}. Both these instruments call for laws, policies and practices that are child-focused and use a rights-based approach, calling on governments and institutions to not just retrofit adult policies to children.

The *Children and Young People (Safety) Act 2017* also provides children with other protections, including a set of promises to ensure all children are safe from harm, do well at all levels of learning, have skills for life and are active citizens who have a voice and

influence. This is very important in respect to any restrictive practices that children are subject to, as more often than not these practices will result in trauma to the child of some kind and this can have long lasting deleterious effects on children's emotional and developmental growth. These practices should only be used as an absolute last resort and only if these practices are part of a personal plan and result in the development of new behaviours that mitigate the need for these practices now and in the future. It is imperative that this Bill "gets it right" and strikes a right balance, with the aim of reducing and eliminating restrictive practices for children and young living with disability.

Due to the above, this Bill needs to specifically insert guidance so that child safe and child centred policies, principles and practices are embedded throughout. To do this I have provided some recommendations in the following sections.

I would welcome the opportunity to discuss any of this in further detail at a time convenient to you.

Yours sincerely,



Helen Connolly
Commissioner for Children and Young People

Introduction

Overall, the Bill appears to cover what it should, including ensuring that it complies with the national principles for restrictive practices authorisation that will align to the National Disability Insurance Scheme. However, it is also wanting in some areas, particularly in relation to the different response required for children and young people.

In respect to children living with disability and their rights and protections, I have looked at the most recent concerns and recommendations made by the United Nations Committee on the Rights of the Child in its *Concluding observations on the combined fifth and sixth reports of Australia* (1 November 2019) and the Committee on the Rights of Persons with Disabilities *Concluding Observations on the combined second and third periodic reports of Australia* (15 October 2019). Relevant concerns and recommendations include:

- The lack of focus on the rights of children with disabilities in the national plan of action for the realisation of the rights of the child (s13(a) CRPD);
- The lack of early intervention mechanisms for children with disabilities (13(b) CRPD);
- The lack of disability-appropriate and age-appropriate assistance for children with disabilities to participate and express their views (13(c) CRPD);
- The practice of retaining and restraining children with disabilities in adult settings (27(e) CRPD);
- Legislation, policies and practices that permit the use of psychotropic medications, physical restraints and seclusion under the guise of “behaviour modification” and restrictive practices against persons with disabilities, including children, in any setting, including in justice, education, health, psychosocial and aged care facilities (29(a) CRPD);
- The significant increase in students with disabilities experiencing a segregated education, seclusion, isolation and a lack of age-appropriate settings, and about insufficient funding for inclusive education in mainstream schools (45(b) CRPD). The Committee on the Rights of the Child highlighted the need to ensure that all children with disabilities have access to inclusive education in mainstream schools and are provided with the support they need and to address the use of restraints and seclusion (43(c) CRC);
- Reports that children in detention (many of whom live with a disability) are frequently subjected to verbal abuse and racist remarks, deliberately denied access to water, restrained in ways that are potentially dangerous and excessively subjected to isolation (47(c) CRC). It is recommended that the state should explicitly prohibit the use of isolation and force, including physical restraints, as a means of coercion or to discipline children under supervision, promptly investigate all cases of abuse and maltreatment of children in detention and adequately sanction the perpetrators (48(c) CRC).

These concerns should be at the forefront of policy and law makers’ minds when addressing restrictive practices committed on children. The following recommendations should provide protections that will ensure that children’s best interests are taken into

consideration and that restrictive practices are used only as a last resort with the goal that these practices are eliminated in the long term.

The principles in the Bill and the Act should explicitly recognise relevant international laws outside the CRPD.

The UNCRC recognises that there is a duty for governments to legislate and implement policy that recognises the different rights and protections that children have.

Despite this, the Principles outlined in the *Disability Inclusion Act 2018* only explicitly recognises the Convention on the Rights of Persons with Disabilities, stating that other “international instruments apply from time to time”. To reduce any ambiguity the Bill should be amended so that the Act will explicitly name the UNCRC, the Convention Against Torture (CAT) and the Optional Protocol Against Torture (OPCAT).

This would then support the Principles contained under section 9(3) of the *Disability Inclusion Act 2018* and support and guide policy makers to formulate appropriate guidance on how and when restrictive practices should occur to children.

The best interests of the child.

The Bill does not recognise that with any decision and action in relation to a child be done in their “best interests”. This is despite the Act acknowledging the different needs of children, including the right to live a full life, that any decisions are child-centred and that their developmental needs are different and must be taken into account. These are elements of children’s best interests and therefore, it is arguable that s9(3) should be amended to make children’s best interests the primary principle in respect to children and young people living with disability.

The Bill should acknowledge children require a different response.

It is concerning – but not surprising – that the Bill explicitly states that restrictive practices can be used on children, while not explicitly acknowledging their inherent rights and vulnerability – both physical and emotional. This is despite section 5 of the *Children and Young People (Advocacy and Oversight Bodies) Act* and recent recommendations made by the UN Committee on the Rights of the Child.

There is an opportunity for this Bill to directly refer back to the Principles set out in section 9(1) and (3) of the Act, operationalising these principles into Part 6A of the Act when it relates to restrictive practices being committed on children. It should also recognise the power imbalance between children and adults.

The Bill could be amended to explicitly acknowledge the need for a different approach to restrictive practices on children through policies, training and practices. In particular it is recommended that when it comes to restrictive practices on children and young people the following apply:

- The Principles outlined in 23G could reiterate section 9(3) of the Act. The statement in 23G stating that the Principles it outlines refers to this Part may

create a confusion for policy makers. For example, will 23G in the Bill override s9(3) currently in the Act in relation to Part 6A? To ensure children's rights are protected and promoted it should be made clear that 23G builds on s9(3) and that it still applies when operationalising Part 6A;

- 23H of the Bill talks about the creation of restrictive practices guidelines by the Minister. This should be amended to explicitly state that the guidelines must provide specific guidance in relation to vulnerable groups, including children and Aboriginal and Torres Strait Islander children;
- 23H also talks about stakeholder consultation when creating these guidelines. It is imperative that children living with a disability are genuinely consulted in this process, not just their parents or advocates. This office has been talking to children and young people living with disability and their parents and advocates. Both have a very different lens in relation to what they see as important. The adults in their lives are primarily focussed on their disability, the support and services that they can access to assist with the disability. Children and young people we have talked to are primarily focussed on just being children and having the same opportunities as other children and therefore both parties will have different views about restrictive practices;
- The list of prohibited restrictive practices that will be produced through the Regulations should acknowledge section 9(3) so that there is a separate section for what types of restrictive practices are prohibited in relation to children. This would also address concern 29(a) from the CRPD about the use of restrictive practices in the guise of behaviour modification. For example, prone restraint and floor restraints should not be used on children at all and are potentially dangerous.

The Royal Commission into the Detention and Protection of Children in the Northern Territory found:

“The practice of applying a restraint and then forcing into a prone restraint position for an extended period of time whilst a child or young person is struggling is potentially dangerous and may breach the law. This practice is also contrary to the human rights standards in Article 64 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, which stipulates that:

- restraints should only be used in exceptional circumstances, and
 - that restraints should only be used for the shortest possible period of time,
- and which were embodied in section 153 of the Youth Justice Act prior to its amendment in August 2016, which only authorised restraints in emergency situations and only allowed the restraint to be used until the emergency situation no longer existed.”^{vi}

ⁱ Section 5 *Children and Young People (Oversight and Advocacy Bodies) Act 2016*.

ⁱⁱ Section 14(e) *Children and Young People (Oversight and Advocacy Bodies) Act 2016*.

ⁱⁱⁱ Declaration on the Rights of the Child, United Nations, 1959 accessed at

<https://www.humanium.org/en/declaration-rights-child-2/>

^{iv} What is the Convention on the Rights of the Child? The world's most widely ratifies human rights treaty in history., UNICEF, accessed at <https://www.unicef.org/child-rights-convention/what-is-the-convention>

^v Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Volume 2A at p 242, accessed at

<https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-2a.pdf>.